UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

In re FEDEX GROUND PACKAGE SYSTEM, INC., EMPLOYMENT PRACTICES LITIGATION	Case No. 3:05-MD-527-RM (MDL 1700) Judge Robert L. Miller Jr.
THIS DOCUMENT RELATES TO: *Craig, et. al. v. FedEx Ground Package Systems, Inc.*, Civil No. 3:05-cv-00530-RLM-MGG (LA)	

MEMORANDUM OF LAW IN SUPPORT
MOTION FOR PRELIMINARY APPROVAL
OF PROPOSED ERISA CLASS ACTION SETTLEMENT

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Plaintiffs Leo Rittenhouse, Jeff Bramlage, Lawrence Laible, Kent Whisler, Mike Moore, Keith Berry, Matthew Cook, Heidi Law, Sylvia O'Brien, Neal Bergkamp, and Dominic Lupo[1] ("Named Plaintiffs") submit this brief in support of Plaintiffs' Motion for Preliminary Approval of the ERISA Class Action Settlement. The settlement obtained in this case was reached after years of vigorous litigation and is the result of arm's-length negotiations with the assistance of a skilled neutral mediator. The settlement reached is fair, reasonable, and adequate. For the reasons stated below and in the Joint Declaration in support of preliminary approval ("Joint Declaration"), Named Plaintiffs ask the Court to preliminarily approve the settlement; order that Notice be issued; and schedule a hearing on final approval of the settlement.

I. PROCEDURAL AND FACTUAL BACKGROUND

The *Craig* action was initially filed in February 11, 2003, in the District Court of Jefferson County, Kansas by the Named Plaintiffs against FedEx Ground Package System, Inc. ("FXG") on behalf of a putative class of FedEx Ground pickup and delivery drivers in the State of Kansas. The case was removed to the United States District Court for the District of Kansas on October 31, 2003. Prior to transfer of the *Craig* action into the MDL, the *Craig* complaint included a claim for employee benefits asserted on behalf of Kansas drivers under the Employee Retirement Income and Security Act (" ERISA") in addition to the claims asserted under the Kansas Wage Payment Act ("KWPA") and at common law (which have now been settled). Similar claims were also asserted under ERISA in complaints filed in seven other statewide class actions that were

[1] Carlene Craig withdrew as a Named Plaintiff on November 29, 2006. *See* Doc. No. 409. Plaintiffs Ronald Perry and Alan Pacheco are not movants for preliminary approval and, instead, have stated their intention to file an outline of objection to approval by September 22, 2017. Named Plaintiffs, together with Plaintiffs Perry and Pacheco, are collectively referred to herein as the "ERISA Plaintiffs."

consolidated into this MDL docket including South Carolina, Mississippi, Virginia, Wisconsin, Massachusetts, Oregon, and Rhode Island.

On January 9, 2006, the MDL Co-Lead counsel filed a Second Amended Complaint in the *Craig* case which, *inter alia*, asserted claims for employee benefits under ERISA on behalf of a nationwide class of FXG pickup and delivery drivers. Doc. No. 82.

Beginning in February 2006, FXG filed motions to dismiss the ERISA claims asserted in *Craig* and the seven other actions. Doc. Nos. 142-72. On June 2, 2006, the Court denied the motion with respect to the *Craig* action and granted the remaining motions based upon the fact that the ERISA claims in the seven other cases were subsumed in the *Craig* national ERISA claim. Doc. No. 276. In ruling on the motion to dismiss, the Court wrote extensively on the differing limitations of class periods for Kansas and non-Kansas residents in the context of the relation-back doctrine to claims originally pled. For Class members who reside in Kansas, the ERISA claim extends back to February 11, 1998. For Class members who reside elsewhere, the ERISA claim extends back to January 9, 2001. *Id*. at 11. FXG also moved to dismiss benefit claims in five additional state cases asserting that those cases were pre-empted by ERISA. The Court denied this motion finding that the benefit claims were specifically for state law benefit claims and that ERISA claims were specifically disavowed in favor of the *Craig* national claim. Doc. No. 334.

Plaintiffs promulgated written discovery to FXG pertaining to the nationwide ERISA claim and FXG's benefit plans and deposed FXG Human Resource personnel and several employees of FXG's parent company, FedEx Corporation, responsible for management of the FXG employee benefit plans.

Plaintiff's motion for certification of a nationwide ERISA class, filed in March 2007, was granted by this Court in October 2007. Doc. No. 906. The Court certified the following ERISA class:

> All persons who: 1) entered into a FXG Ground or FXG Home Delivery Form Operating Agreement (now known as a Form OP-149 and Form OP-149 RES); 2) drove a vehicle on a full-time basis (meaning exclusive of time off for commonly excused employment absences) during the class period to provide package pick-up and delivery services pursuant to the Operating Agreement; and 3) were eligible for ERISA Plan benefits, absent their mischaracterization as independent contractors.

Id. at 46. Notice was provided to more than 27,000 FXG drivers who were originally identified by FXG as potential members of the nationwide ERISA class. 151 class members elected to opt-out. Doc. No. 2054.[2] The settlement class has been modified to exclude members of the certified classes in the Arkansas, Florida, and Indiana cases because the previously-negotiated settlements in those states included release of the ERISA claims. As part of the settlement process, FXG provided an updated class list including 22,134 FXG drivers.

On June 12, 2008, FXG moved for partial summary adjudication based on the ERISA Plaintiffs' alleged failure to exhaust administrative remedies. Doc. No. 1410. Plaintiffs opposed the motion on August 28, 2008. Doc. No. 1595. On June 28, 2010, the Court granted FXG's motion for partial summary judgment and dismissed the ERISA Plaintiffs' claims without prejudice. (Doc. 2078). The Court found that:

> Even though it is likely that the plaintiffs' claim will be denied because FedEx has classified them as independent contractor, the court declines to exercise its discretion to find futility when the evidence is sufficient to show with certainty that the claims would be denied.

[2] FXG unsuccessfully sought interlocutory review of the class certification under Rule 23(f).

Doc. No. 078 at 30. The Court directed that only the named plaintiffs must exhaust administrative remedies. *Id.* at 32. Thereafter, the ERISA Plaintiffs engaged in multiple levels of administrative review for each of the benefit plans for which benefits were sought. In each instance, the Plan Administrator denied the ERISA Plaintiffs' claims on the basis that they were excluded from participation in FXG's employee benefit plans because they were classified as independent contractors. See Exhibit B to the Joint Declaration. At the time the administrative review was completed in February 2011, the *Craig* action was on appeal before the Seventh Circuit. Doc. No. 2127.

On July 8, 2015, the Seventh Circuit reversed this Court's order granting summary judgment to FXG and denying summary adjudication to the Kansas Plaintiffs and remanded the *Craig* case to this Court with instructions to enter judgment for Plaintiffs that they are employees under Kansas law, and for further proceedings. *In re FedEx Ground Package Sys., Inc. Employment Prac. Litig.*, 792 F.3d 818, 821 (7th Cir. 2015). During this time frame, the parties began discussions about settling the state law claims in *Craig* case as well as the ERISA claims and claims in other cases pending at the Seventh Circuit Court of Appeals. As soon as the *Craig* case was remanded to this Court, it was immediately stayed to facilitate settlement discussion between the parties.

The parties agreed to retain Michael Dickstein, a well-respected mediator who had successfully mediated the remanded California case. The state law claims portion of the *Craig* case proceeded to mediation on October 29, 2015 and the state law claims were settled on that date. As the ERISA claims were distinct from the state law claims, a separate day of mediation was scheduled. Plaintiffs engaged forensic accounting expert, David Breshears of Hemming Morse, Inc. to calculate Plaintiffs' potential damages in the ERISA case. Mr. Breshears

reviewed and analyzed voluminous class-wide data produced by FXG which he used to prepare a comprehensive damage exposure model for the ERISA Class.

In advance of the mediation, the parties exchanged comprehensive mediation briefs that included their respective analyses of the strengths and weaknesses of the legal claims and defenses, and the other potential litigation risks facing both sides in the absence of settlement. The parties also exchanged damages models in order to understand and review how each side had analyzed the data. Also in advance of the mediations, Co-Lead Counsel consulted with the local counsel for the Named Plaintiffs and coordinated their attendance at the upcoming mediations.

The parties participated in an all-day in-person mediation of the ERISA claim on June 6, 2016 in San Francisco. The case did not resolve that day, but the parties continued to work toward resolution of the ERISA claim with the continued assistance of the mediator. Over the course of several months, counsel addressed substantive issues bearing on the value of the ERISA claims, as well as the total settlement consideration to be paid by FXG, the apportionment of settlement consideration between the benefit plans, additional claims that could be asserted, the scope of the release for claims, and drafting of settlement documentation. Ultimately, the parties succeeded in reaching a tentative settlement, the terms of which are set forth in a "Deal Point Memorandum" executed by the parties on June 7, 2017. These terms are memorialized in the formal Settlement Agreement ("Agreement") attached as Exhibit A to the Joint Declaration presented here for the Court's approval.

II. THE PROPOSED SETTLEMENT AGREEMENT

The key provisions of the Agreement are as follows:

FXG will pay the gross sum of $13,325,000 to resolve the ERISA class claims. 52.5% of the net common fund (i.e. after deductions of settlement administration and notice costs, service awards, and attorneys' fees) will be allocated to resolve claims for life insurance benefits

presented by the legal heirs or estates of deceased class members who died while their FXG contracts were active ("Life Insurance Fund"). 47.5% of the net common fund will be allocated to resolve the ERISA benefit claims under the other employee benefit plans that were in effect during the release period, which include the FXG medical, dental, vision, long term disability, short term disability and 401(K) plans ("General Settlement Fund"). The Life Insurance Fund will be subject to a possible reversion to FXG if funds remain after all the claims filed for settlement payments have been resolved under the applicable state law. The General Settlement Fund will be distributed to the Class with no reversion to FXG. $13,325,000, less any reversion for the Life Insurance Fund, is referred to herein as the "Total Settlement Fund." The Total Settlement Fund will be distributed through a qualified settlement fund ("QSF"). Rust Consulting will act as the settlement administrator.

The Total Settlement Fund will be allocated and distributed as follows:

- Approximately $8,631,911 of the Total Settlement Fund will be available for distribution to the Class; $4,104,251.87 will be distributed to the common benefit participants and $4,527,659.20 will be available to pay claims asserted by eligible life insurance benefit fund participants ;
- Up to 33.33% for attorneys' fees and costs (a maximum of $4,377,062);
- The estimated claims administration and notice costs are $125,000;
- Incentive awards totaling $67,500 (up to $7,500 for Plaintiff Whisler and $5,000 for 12 remaining class representatives); and
- A Reserve Fund of $131,325.

The General Settlement Fund will be distributed among the Class Members who certify that they meet the class definition of a full-time driver, based on their *pro rata* months they drove

within the Class Recovery Period. Class members will receive a settlement payment if their estimated claim is in excess of $10.00 based upon an estimated value of $3.258 for each month in which they drove for FXG. The average per class member recovery, net of costs for settlement administration and attorneys' fees and costs, from the common benefit fund will be approximately $197.01, in the range between $10.07 to $764.93. Any unclaimed funds from the common benefit fund following the first distribution will be redistributed to the Class members on a *pro rata* basis based on their months worked within the Class Period. After the second round distribution, any uncashed checks will go to a *cy pres* recipient to be mutually agreed upon by the parties.

The Life Insurance Fund will be distributed to the estates or legal heirs of deceased ERISA class members who died while their FXG contracts were active according to the following formula: (a) claims made by the estates/ legal heirs of deceased class members who were single work area drivers in the year before they died will be paid 60% of 150% of the 1099 earnings reported by FXG in the year prior to the deceased Class Member's death; or (b) claims made by the estates/ legal heirs of deceased class members who were multiple work area drivers in the year before they dies will be paid the lesser of 60% of 150% of the 1099 earnings reported by FXG in the year prior to the deceased class member's death or $90,000 (which is 60% of 150% of $100,000 in earnings). The final adjudication of claims against the Life Insurance Fund will be completed one week prior to final approval of the settlement. In no event will the amount paid to a claimant exceed the limit under the life insurance policy relevant to each claim

Class Counsel will seek Court approval for an award of attorney's fees and litigation costs of up to 33.33% of the settlement amount, subject to the filing of a fee motion in order to give the Class time to review the request prior to Court approval. Class Counsel will apply for service

payments of $7,500 for Plaintiff Whisler who attended the mediation and $5,000 payable to each of the other ERISA Plaintiffs.

In return for the above consideration to be provided by FXG, the settlement, if it receives final approval, will result in a general release by Plaintiffs and a release by all ERISA Class Members of all claims that were brought, or that could have been brought, against FXG arising out of or relating to the allegations set forth in the Fifth Amended Complaint pertaining to alleged violations of ERISA or similar state laws. The release period will run from the beginning of the class period through the date of filing this motion for preliminary approval of the settlement. Upon entry of the Final Approval Order, this action shall be dismissed with prejudice and all Released Claims shall thereby be conclusively settled as to ERISA Plaintiffs and the ERISA Class Members.

The proposed settlement is the product of arm's-length negotiations with a respected mediator and is fair and reasonable in light of the risks the Plaintiffs and Class Members face in connection with continued litigation over liability, proof of damages and class membership, the length of the class period and other defenses asserted by Defendant. Accordingly, Plaintiffs request that the Court: (1) grant preliminary approval of the proposed settlement; (2) approve the form, content, and method of distribution of the Notice; (3) appoint Rust Consulting as the Settlement Administrator; and (4) schedule a hearing regarding final approval of the proposed Settlement, attorneys' fees and costs, and service payments to the Named Plaintiffs who actively participated in the litigation. FXG does not oppose Plaintiffs' Motion and agrees with the proposed schedule for notice and case deadlines.

III. ARGUMENT

A. The Standard For Preliminary Approval Of The Settlement

Rule 23(e) of the Federal Rules of Civil Procedure requires court approval of any settlement of a class action. A district court must scrutinize and evaluate a class action settlement

to determine whether it is "fair, reasonable, and adequate." *Williams v. Rohm & Haas Pension Plan*, 658 F.3d 629, 634 (7th Cir. 2011) (quoting Fed. R. Civ. P. 23(e)(2)); *Anderson v. Torrington Co.*, 755 F. Supp. 834, 838 (N.D. Ind. 1991) (Miller, J.). "Federal courts naturally favor the settlement of class action litigation." *Isby v. Bayh*, 75 F.3d 1191, 1196 (7th Cir. 1996); *Donovan v. Estate of Fitzsimmons*, 778 F.2d 298, 307 (7th Cir. 1985). "In the class action context in particular, there is an overriding public interest in favor of settlement." *Armstrong v. Bd. of Sch. Dist. of City of Milwaukee*, 616 F.2d 305, 313 (7th Cir. 1980) *overruled on other grounds by Felzen v. Andreas*, 134 F.3d 873 (7th Cir. 1998); *see also* Herbert B. Newberg & Alba Conte, Newberg on Class Actions, § 11.41 (4th ed. 2002) ("The compromise of complex litigation is encouraged by the courts and favored by public policy."). Settlement of class action litigation "also reduces the strain such litigation imposes upon already scarce judicial resources." *Armstrong*, 616 F.2d at 313.

Prior to analyzing the proposed settlement, a reviewing court should determine whether "there is any reason to notify the class members of the proposed settlement and to proceed with a fairness hearing," *Gautreaux v. Pierce*, 690 F.2d 616, 621 n.3 (7th Cir. 1982); *Armstrong*, 616 F.2d at 314. If so, a proposed settlement subsequently may be finally approved by the court if it is determined to be lawful, fair, reasonable, and adequate. *Isby*, 75 F.3d at 1196; *E.E.O.C. v. Hiram Walker & Sons, Inc.*, 768 F.2d 884, 889 (7th Cir. 1985).

District court review of a proposed class action settlement thereafter "is a two-step process. The first step is a preliminary, pre-notification hearing to determine whether the proposed settlement is within the range of possible approval. This hearing is not a fairness hearing." *Armstrong*, 616 F.2d at 314; *Gautreaux*, 690 F.2d at 621 n.3; *Am. Int'l Group, Inc. v. ACE INA Holdings, Inc.*, 2011 WL 3290302, at *6 (N.D. Ill. July 26, 2011) (Court is merely to determine

whether proposed settlement is within range of possible approval, "not to conduct a full-fledged inquiry into whether the settlement meets Rule 23(e)'s standards."); *In re AT&T Mobility Wireless Data Serv. Sales Litig.*, 270 F.R.D. 330, 346 (N.D. Ill. 2010) (same); *In re NCAA Student-Athlete Concussion Injury Litig.*, 2016 WL 305380, at *6 (N.D. Ill. Jan. 26, 2016) ("This is why some courts at this stage perform a summary version of the exhaustive final fairness inquiry.") "Ultimately, preliminary approval requires only that the settlement figure is within a reasonable range." *Am. Int'l Grp*, 2011 WL 3290302, at *7; *Zolkos v. Scriptfleet, Inc.*, 2014 WL 7011819, at *2 (N.D. Ill. Dec. 12, 2014) (same).

Five factors aid courts in analyzing preliminary approval including:

(1) the strength of plaintiffs' case compared to the terms of the proposed settlement;

(2) the likely complexity, length and expense of continued litigation;

(3) the amount of opposition to settlement among [a]ffected parties;

(4) the opinion of competent counsel; and

(5) the stage of the proceedings and the amount of discovery completed.

Synfuel Techs., Inc. v. DHL Express (USA), Inc., 463 F.3d 646, 653 (7th Cir. 2006); *Wong v. Accretive Health, Inc.*, 773 F.3d 859, 863-64 (7th Cir. 2014); *Anderson*, 755 F. Supp. at 838. All five factors strongly support preliminary approval of this settlement.

B. The Proposed Settlement Is Within The Range Of Possible Approval And Should Be Preliminarily Approved Under Fed. R. Civ. P. 23(e).

1. The Strength of Plaintiffs' Case Compared to the Terms of the Proposed Settlement

The Seventh Circuit has held that "[t]he most important factor relevant to the fairness of a class action settlement is the strength of plaintiff's case on the merits balanced against the amount offered in the settlement." *Wong*, 773 F.3d at 863-64; *Synfuel*, 463 F.3d at 653; *In re Gen. Motor Corp. Engine Interchange Litig.*, 594 F.2d 1106, 1132 (7th Cir. 1979); *Armstrong v. Bd. of Sch.*

Dist. of City of Milwaukee, 616 F.2d at 313. A court cannot make an informed judgment about the fairness, reasonableness, and adequacy of a class without assessing the likelihood and value to the class of the case's possible outcomes, referred to as the net expected value of the litigation. *See Williams*, 658 F.3d at 634 (citing *Synfuel Techs.*, 463 F.3d at 653); *Reynolds v. Ben. Nat'l Bank*, 288 F.3d 277, 284-85 (7th Cir. 2002) (in analyzing this factor, courts should attempt "to quantify the net expected value of continued litigation to the class . . . Determining that value would require estimating the range of possible outcomes and ascribing a probability to each point on the range."); *Mars Steel Corp. v. Cont'l Illinois Nat'l Bank & Trust Co. of Chicago*, 834 F.2d 677, 682 (7th Cir. 1987) ("A settlement is fair to the plaintiffs in a substantive sense ... if it gives them the expected value of their claim if it went to trial, net of the costs of trial"); *Wong*, 773 F.3d at 863. While "a high degree of precision cannot be expected in valuing a litigation, the court should nevertheless insist that the parties present evidence that would enable possible outcomes to be estimated, so that the court can at least come up with a ballpark valuation." *Synfuel*, 463 F.3d at 653 (citing *Reynolds*). The Court must avoid conducting a trial on the merits in evaluating this factor, the Court should make an independent determination of the strengths of the Plaintiffs' case weighed against the terms of the settlement. *Anderson v. Torrington Co.*, 755 F. Supp. 834, 838 (N.D. Ind. 1991).

Evaluating the strength of the ERISA Plaintiffs' claim on the merits involves an analysis of the threshold question of whether the Plaintiffs were common law employees despite their classification by FXG as independent contractors, followed by analysis of whether Plaintiffs satisfied the eligibility requirements set forth in the terms of each of the FXG employee benefit plans at issue in the case, the temporal scope of the claims in light of amendments to the Plans implemented by FXG during 2001 and afterwards, the amount of recoverable damages, and the

likelihood FXG would succeed in defeating the claims in whole or in part through its affirmative defenses.

The ERISA Plaintiffs assert claims pursuant to 502(a)(1)(b) to "recover benefits due [them] under the terms of [their] plan, to enforce [their] rights under the terms of the plan, or to clarify [their] rights to future benefits under the terms of the plan." *Craig* Doc. No. 252 at 21.[3] To prevail, ERISA Plaintiffs would have to establish they are participants under the various benefit plans. To do so, Plaintiffs must show that they: 1) were common law employees, despite FXG's assertions to the contrary; and 2) met all other eligibility requirements for plan participation set forth in the benefit plan documents. *See Wolf v. Coca-Cola Co.*, 200 F.3d 1337, 1340 (11th Cir. 2000) (ERISA imposes a two-part test for participant status; employment and eligibility under the benefit plan).

The Named Plaintiffs were confident they would prevail in establishing their status as common law employees under ERISA, which turns on the "right to control" test articulated in *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 323 (1992). ("In determining whether a hired party is an employee under the general common law of agency, we consider the hiring party's right to control the manner and means by which the product is accomplished.") The *Darden* test is nearly indistinguishable from that applied by Kansas Supreme Court and the Seventh Circuit in concluding that the Kansas drivers were FXG employees as a matter of law. *Craig, et al. v. FedEx Ground Package Sys., Inc.*, 335 P.3d 66 (Kan. 2014); *Craig v. FedEx Ground Package Sys., Inc.*, 792 F.3d 818, 820 (7th Cir. 2015) ("The Kansas court stated a slightly different articulation of the 20-factor test, but the essence of the 20 factors remains the same."). As a result, the Named

[3] ERISA § 502(a)(1)(B) expressly provides participants and beneficiaries of employee benefit plans with a private right of action to recover benefits owed under a plan. *See Bast v. Prudential Ins. Co. of Am.*, 150 F.3d 1003, 1008 (9th Cir. 1998).

Plaintiffs perceived relatively little risk that the application of the undisputed record to the accepted legal test would result in a finding of employee status just as the Seventh Circuit found in *Craig*.

Posing a greater risk to plaintiffs' success on the merits of the ERISA claim was the question of whether plaintiffs meet the plans' definition of employee. "[An employer] is free to define the terms in its plan however it wishes." *See Trombetta v. Cragin Fed. Bank For Sav. Employee Stock Ownership Plan*, 102 F.3d 1435, 1440 (7th Cir. 1997). Plaintiffs relied on the fact that the applicable benefit plans broadly define the term "employee." However, FXG asserted that in most instances, independent contractors were excluded by definition. This issue was brought in sharp focus after the Court partially granted summary judgment to FXG based on plaintiff's failure to exhaust administrative remedies. Doc. No. 2078. After the ERISA Plaintiffs sought administrative review under the various plans, benefits were defined because the plan administrators did not find that the ERISA Plaintiffs met the definition of "employee" as that term is defined in the documents for each particular plan. See Exhibit B to the Joint Declaration.

As a result of the administrative findings, Plaintiffs faced the risk that, upon review by a Court, the plan administrators' findings would be given full deference in making such a determination absent a showing of an arbitrary or capricious review. *Herzberger v. Standard Ins. Co.*, 205 F.3d 327, 332 (7th Cir. 2000). Should the matter proceed, Plaintiffs would argue that the plan administrators based their review of the claims for benefit upon mistaken fact, namely that the drivers were not employees of FXG. Whether that argument would be sufficient to show arbitrary and capricious review poses risk to both Plaintiffs and FXG. If FXG were to succeed in obtaining deferral to the administrative review, it would preclude any claim under ERISA no matter what the theory.

Further limiting the value of potential value of the ERISA claim was the narrow statute of limitations imposed by the Court when addressing the initial motion to dismiss the ERISA claim. Doc. No. 276 at 11. In a lengthy analysis of relation back for the ERISA claim, this Court determined that the ERISA claim began no earlier than February 11, 1998 for ERISA Class members who resided in Kansas, and on January 9, 2001 for all other ERISA class members. *Id*. The Court left open the possibility that time limitations could be further restricted if further development of the factual record showed there was a clear and unequivocal repudiation of claim benefits through the original execution of an Operating Agreement by ERISA Class members or some other factual development. *Id*. Uncertainty as to when the claims accrued directly impacted the value assessment of the claims under the benefit plans.

Another structural impediment to the ERISA claim is that during 2001 and 2002 FXG amended the language of several of its plans to expressly exclude from coverage persons who were "independent contractors later adjudged by a court to be an employee." See Exhibit C to the Joint Declaration. Courts have held that it was a valid enactment by the plan administrator to amend plan language to state that any "individual who is later found to be a common law employee . . . . shall not be considered an employee." *Oplchenski v. Parfums Givenchy, Inc.*, 2009 U.S. Dist. LEXIS 13522, at *11 (N.D. Ill. Feb. 19, 2009); *Vizcaino v. Microsoft Corp.*, 105 F.3d 1334 (9th Cir. 1997). FXG amended certain of the plans to add this language, which cut off the date for recovery from certain of the plans. For the Medical Dental & Vision Plan's claim ended on January 22, 2001 because of the newly-adopted language. For the 401(k) plan, the language was amended on May 31, 2002. As a result of the statute of limitation and cut off for damages as a result of amended plan language, there was a very limited period of recovery for the Medial Plan and the

401(k) plan. For example, ERISA Class Members (other than those from Kansas) held a claim under the Medical Plan for a two-week period between January 9, 2001 and January 22, 2001.

Plaintiffs faced further risk from FXG's assertion of the same set of substantive and procedural defenses to the ERISA claim that it mounted to the state law claims in the *Craig* case (and others) addressed in the earlier settlement approval papers (*e.g.* employment status, de-certification of the ERISA class, and exclusion of multiple work area drivers and incorporated drivers), along with defenses asserted that were particular to the ERISA claim itself. For example, FXG was prepared to argue that the ERISA claim was not timely reasserted after dismissal by this Court in June 2010. Because the Court directed the ERISA representatives to seek administrative review on behalf of the class, which was done, Plaintiffs believe they would have ultimately prevailed.[4] Nonetheless, Plaintiffs recognize that such an argument could eviscerate the entire claim should the relation back argument fail.

Also weighing against full recovery on the ERISA claim were the usual risks of litigation, it was expected that the merits of the claim would be subject to additional challenges should the case proceed to trial. For example, FXG was likely to challenge the continued certification of the class and would likely seek to eliminate or severely reduce legal claims through additional substantive motion practice. Even should Plaintiffs prevail on the merits, there are the invariable battle of experts on issues of damages and vagaries of trial that may well have prevented recovery to the ERISA Class. Counsel for the Named Plaintiffs considered all of the risks and pitfalls when considered whether to recommend approval of the proposed settlement.

[4] "Not all class members must exhaust their administrative remedies . . . . Only the named plaintiffs in this case must exhaust administrative remedies." Doc. No. 2078 at 32. It was therefore not intended that the class be decertified as a result of the partial summary judgment ruling on exhaustion of administrative remedies.

In a diligent effort to maximize the recovery of the class, counsel for the Named Plaintiffs also considered possible additional claims that might be asserted under ERISA beyond the payment of benefits asserted under Section 502(a)(1). In particular, counsel carefully considered the viability of claims that might exist even after FXG amended the Medical and 401(k) plans to exclude from participation workers who were later adjudged by a court to be independent contractors. After researching the legal issues and considering such a claim in the context of the facts presented, counsel for the Named Plaintiffs determined the likelihood of success on any such claim to be extremely low and assigned a very low probability of succeeding on claims other than under Section 502(a)(1) for benefits.

Balanced against the identified risks, ERISA Plaintiffs had to weigh what was an expected net recovery. In order to value the ERISA claim, the ERISA Plaintiffs engaged a forensic accountant to assist in estimation of damages under each Plan and the applicable statute of limitations for Kansas and all other states. Based upon that analysis, the ERISA Plaintiffs' expert calculated the damages for the ERISA Class as follows: a) the maximum damages for claimants on the applicable plans, other than life insurance, totaled $17,450,375; b) the attributable life insurance maximum damages totaled $19,344,487; c) total interest on both claims, although not statutorily required under ERISA but arguably recoverable under case law, equaled $16,917,622. The total maximum damages, without interest, should the ERISA Class succeed in every aspect of the claim, equals $36,794,862.[5] The total maximum damages with interest was calculated to be

[5] The relative percentages of the General Fund (47.5%) and the Life Insurance Fund (52.5%) were determined by looking at what percentages each fund represented of the total maximum achievable damages without interest.

$53,712,484.[6]

The ERISA Plaintiffs recognized the risks, legal impediments, and defenses held by FXG when realistically evaluating the claim to determine the net expected value. Plaintiffs first determined that the unadjusted net expected value of the ERISA claims was $14,717,944 based on, at best, a 40% likelihood of success on the full value of $36,794,862. The risk coefficient was determined after consideration of all risk factors to the claim itself and specifically the very real risk that the plan administrators' denial of benefits would be upheld and not found to be arbitrary and capricious. Plaintiffs calculated that the likelihood of succeeding on the claim for payment of interest was 25%, adding an additional $4,229,000 to the expected net value. A greater risk percentage was assigned to the interest component as there is no statutory entitlement to the payment interest as discussed above. The total unadjusted net settlement value was calculated by plaintiffs to be $18,947,000. The unadjusted net settlement value was subject to further discounts for additional risks presented in this case: loss on employment status (10%); exclusion of multiple work area drivers and drivers who had incorporated (20%); and general litigation risks (15%).[7] With these adjustments, plaintiffs calculated the net expected settlement value to be $10,436,200.

The settlement reached for the ERISA Class was $13,325,000. This amount represents approximately 127% of net expected settlement value and approximately 25% of Plaintiffs'

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[6] ERISA's statutory text does not provide for payment of interest and the availability of pre-judgment interest was heavily contested during the settlement negotiations. Although nothing expressly requires the payment of interest on § 502(a)(1) claims, the Seventh Circuit has acknowledged that pre-judgment interest is presumptively available. *Andujar v. Sun Life Assur. Co. of Can.*, 2014 U.S. Dist. LEXIS 116098, at *7-8 (N.D. Ill. Aug. 19, 2014)(citing *Fritcher v. Health Care Service Corp.*, 301 F.3d 811, 819-20 (7th Cir. 2002); *Rivera v. Benefit Trust Life Ins. Co.*, 921 F.2d 692, 696 (7th Cir. 1991) *("presumption in favor of prejudgment interest awards is specifically applicable* to ERISA cases.")).

[7] These risk adjustments were the same that were utilized in other state settlements approved by the Court.

maximum damages (including interest) under ERISA – well within the range of reasonable settlement value.

The settlement obtained in this case provides ERISA Plaintiffs and the Class Members with concrete, certain benefits in the face of an uncertain final outcome. Further, in addition to the litigation risks that this and every case involves, there is a substantial benefit to obtaining relief now. *Air Lines Stewards & Stewardesses Ass'n v. Am. Airlines, Inc.*, 455 F.2d 101, 109 (7th Cir. 1972) ("[T]he public interest may indeed be served by a voluntary settlement in which each side gives ground in the interest of avoiding litigation"). As such, the Agreement permits ERISA Plaintiffs and the ERISA Class Members to secure the recovery to which they are currently entitled, while eliminating the risk to and protracted delay in obtaining that recovery. The strength of ERISA Plaintiffs' claims compared to the litigation risks supports preliminary approval of the Settlement Agreement as described herein.

2. Likely Complexity, Length and Expense of the Litigation

The complexity, length and expense of continued litigation all weigh heavily in favor of the proposed settlement. The complexity of the ERISA litigation is magnified. Not only are there the threshold questions of employment status, the legal requirements and recoverable damages are all the more complex considering the nature of the class claim. While Plaintiffs would argue that employment status of the drivers has been established based upon the application of the Kansas test which follows the common law test adopted in *Darden*, FXG would likely argue that the *Darden* factors have not been specifically applied in the context of the ERISA claim.

As this Court is aware, adding to the complexity is the fact that trials on the drivers' employment status would involve a very large body of evidence, with evidence needed to satisfy (or refute) a multi-factor test relating to employment status, and specifically FXG's right of control. Damage assessments would likely involve lengthy and expensive expert testimony from

both sides. *See Anderson*, 755 F. Supp. at 844 ("As a practical matter, therefore, despite the seductive apparent simplicity of a class action based on a single decision by an employer, proof of discriminatory motive would be a complex matter [and] [p]roof of damages would be even more complex." Further, there is procedural uncertainty should the case continue that results in greater complexity. FXG agreed to the filing of the Fifth Amended Complaint as part of the terms of settlement. However, should the case continue, the parties stipulated that the Fifth Amended Complaint shall be withdrawn and have no operative effect in this action.

Finally, the length of this litigation is already a factor favoring settlement consider the claim has been pending for thirteen years. Absent settlement, it is uncertain how much longer this claim would continue to be litigated. Even after the claim was reinstituted, it is likely that FXG would move to de-certify the ERISA Class and remand the action to the Kansas District Court. Once in that Court, as this case was bifurcated (liability/damages) in the earliest stages of the MDL, all parties would then have to engage in discovery directed at the damages of the ERISA claim. Thereafter, FXG may well seek summary judgment on the merits of the ERISA claim, instead of seeking a partial judgment on administrative review, with appeals to follow. Even though the ERISA Class has already waited more than thirteen years for resolution of the claim, absent a settlement, the length until final resolution could be several years longer. *See Isby*, 75 F.3d at 1199-1200 (settlement approved where "continuation of the litigation would require the resolutions of many difficult and complex issues, would entail considerable additional expense and would likely involve weeks, perhaps months, of trial time,"); *Swift v. Direct Buy, Inc.*, 2013 WL 5770633, at *6 (N.D. Ind. Oct. 24, 2013) ("obtaining any result in this litigation – good or bad – would be years away if the litigation were to continue, which weighs in favor of approving the Settlement Agreement."); *Am. Int'l Grp.*, 2011 WL 3290302, at *7 ("continuing to litigate this

case will require vast expense and a great deal of time, on top of that already expended."). This factor strongly supports preliminary approval of the proposed ERISA settlement.

3. Amount of Opposition to the Settlement Among Affected Parties

Generally, "because the parties have not yet sent the notice [of proposed settlement], it is premature to fully assess this factor" at the preliminary approval stage. *AT&T Mobility*, 270 F.R.D. at 349; *Am. Int'l Grp.*, 2011 WL 3290302, at *7 ("insofar as it is proper to consider at preliminary approval the amount of opposition to settlement . . . this third factor weighs in favor of approving the proposed settlement."). Although Counsel will not know the extent of support for the proposed settlement until notice is disseminated, the notice of pendency of the ERISA Class was sent in 2008. At that time, there were 131 opt-outs (as opposed to objections) from more than 27,000 mailed notices. Plaintiffs' Counsel does not anticipate broad opposition to the proposed settlement from the ERISA class members.

Counsel for Perry and Pacheco has indicated that they will likely object to the settlement. Every class member, even a representative class member, is entitled to make that decision for him or herself. However, the fact that two of the thirteen named ERISA Plaintiffs object to the proposed settlement is not deserving of any special weight and should not serve as an independent basis to deny approval of the entire ERISA Class. *In re Gen. Motors Corp.*, 549 F.2d at 1128 n.34.

To gauge the sentiment of the ERISA Class both for and against the proposed settlement, notice should be sent with clear directions on how to object should a class member wish to do so. *See Am. Int'l Grp.*, 2011 WL 3290302, at *7 ("at this point, the only way to gauge any additional opposition is to solicit it by sending notice of the settlement to the class and inviting its members to voice their opinions.").

4. Opinion of Competent Counsel

In evaluating the fairness of the proposed settlement, courts are "entitled to rely heavily on the opinion of competent counsel." *Gautreaux*, 690 F.2d at 634 (quoting *Armstrong*, 616 F.2d at 325); *Anderson*, 755 F. Supp. at 846 (same); *Swift*, 2013 WL 5770633, at *5 (court found it "appropriate to place significant weight on the opinion of counsel in concluding that the Settlement is reasonable in light of the value of further litigation."). As the Seventh Circuit has stated:

> While the court, of course, should not abdicate its responsibility to review a class action settlement merely because counsel support it, the court is entitled to rely heavily on the opinion of competent counsel.... Counsel for the plaintiff class and counsel for the defendants had been extensively involved in the litigation through virtually all of its history, giving the court ample time to evaluate their competence and the weight to be accorded their opinions.... [S]ettlement of this litigation was reached at a very late stage, after the issues had been clearly identified, liability and impact had been decided, and a massive record had been compiled. The district court found, and we agree, that the litigation had progressed to a point at which counsel and the court were fully capable of evaluating the merits of plaintiffs' case and the probable course of future litigation.

Armstrong, 616 F.2d at 325. *See In re Telectronics Pacing Sys., Inc.*, 137 F. Supp. 2d 985, 1016 (S.D. Ohio 2001) ("The Court should always give significant weight to the belief of experienced Counsel that the settlement is in the best interest of the class."). In addition to the opinion of counsel, the Court must consider whether the Class Members were properly represented by their counsel and Class representatives. *In re Gen. Motors Corp.*, *supra*. Here, there can be no doubt about Plaintiffs' Counsel's tenacious advocacy both before this Court and the Seventh Circuit during the past eleven years.

The opinions of counsel are especially reliable when the proposed settlement is the result of arm's-length negotiations with an experienced mediator. *See Wong*, 773 F.3d at 864 (district court did not abuse its discretion in approving settlement where "the settlement was reached through extensive arm's-length negotiations with an experienced third-party mediator."); *Zolkos*,

2014 WL 7011819, at *2 (preliminary approval granted where "two experienced class action employment mediators, Mark Rudy and Michael E. Dickstein, assisted the parties with the settlement negotiations and presided over two full-day mediations."); *Swift*, 2013 WL 5770633, at *4 ("An agreement was reached only after extensive arm's-length negotiations during three days of in-person formal mediation."); *Kaufman v. Am. Express Travel Related Serv., Co.*, 2016 WL 806546, **9-10 (N.D. Ill. Mar. 2, 2016).

The parties reached the Agreement not only after arm's-length negotiations, but also after significant investigation and discovery, motion practice, as well as mediation briefing, that enabled Plaintiffs' Counsel to evaluate on an informed basis the claims and defenses in this case. Consequently, Plaintiffs' Counsel is well aware of the strengths and weaknesses of the ERISA Plaintiffs' claims.

Counsel for the Named Plaintiffs agreed after engaging in the thorough analysis described above, that the settlement obtained was in the best interests of the ERISA Class and represents, in terms of the percentage of the maximum damages, likely recoverable damages, and the risks of succeeding on the claim, an excellent result for the ERISA Class. Because the settlement, in the opinion of Counsel for the Named Plaintiffs, was fair, adequate and reasonable, it should be approved.

5. Stage of the Proceedings and the Amount of Discovery Completed

This final consideration is "important because it indicates how fully the district court and counsel are able to evaluate the merits of Plaintiffs' claims." *Armstrong*, 616 F.2d at 325; *Swift*, 2013 WL 5770633, at *7 (same); *Am. Int'l Grp.*, 2011 WL 3290302, at *8 ("more than sufficient discovery has been undertaken to provide the parties with information about their respective litigation positions.").

More so than any other claim that was a part of the MDL, the ERISA claim was subjected to numerous challenges and discovery. The ERISA claim was subject to two separate motions to dismiss, challenged at the class certification stage, the subject of numerous document requests, interrogatories and requests for admission, the primary focus of at least three depositions, and the subject of a motion for partial summary judgment. Moreover, as part of the mediation process, FXG provided Plaintiffs' Counsel with all of the electronic data available from multiple sources in order to evaluate and estimate the value of the many deductions taken from the compensation of the members of the ERISA Class during the relevant period. Plaintiffs retained a forensic accounting expert to analyze and create various damages models using various actuarial assumptions. Plaintiffs' Counsel analyzed the damages in light of the strengths and weaknesses of the legal theories available under ERISA after having extensively researched the ERISA claim, analyzed FXG's arguments regarding the claim, considered the claim raised by Counsel for Perry and Pacheco, and extensively argued the merits of the claim and the potential recoveries with FXG and the mediator in reaching a final settlement position.

In short, the Parties' investigation, discovery, and analyses to date are more than sufficient for Plaintiffs, Class Counsel, and the Court to make informed decisions about the proposed settlement. *See Am. Int'l Grp.*, 2011 WL 3290302, at *8 ("Extensive discovery has undisputedly been completed, and the Court has been presented with volumes of argument, declarations and exhibits. Thus, it is impossible to say that the court and the parties are unable to evaluate the merits of their case."); *Anderson*, 755 F. Supp. at 847 ("The deadline for completion of discovery has passed . . . little more remains to be learned about the strengths and weaknesses of the parties' cases."). This factor therefore also supports preliminary approval of the ERISA settlement.

C. Plaintiffs' Proposed Class Notice Program Meets The Requirements Of Rule 23(E).

Under Rule 23(e), the Court "must direct notice in a reasonable manner to all class members who would be bound by a proposed settlement." Fed. R. Civ. P. 23(e)(1). The notice provided to members of a class certified under Rule 23(b)(3) must be the "best notice practicable under the circumstances." Fed. R. Civ. P. 23(c)(2)(B). Rule 23(c)(2) enumerates mandatory components of any initial class notice for a Rule 23(b)(3) class:

- The nature of the action;
- The definition of the class certified;
- The class claims, issues or defenses;
- that a class member may enter an appearance through an attorney if the member so desires;
- that the court will exclude from the class any member who requests exclusion, stating when and how members may elect to be excluded; and
- that a class judgment will include all members who do not request exclusion.

Due process also requires a mailed settlement notice to contain a description of class members' rights in the litigation, and notice that class members have an opportunity to be heard and to participate in the litigation, whether in person or through counsel, and an opportunity to present objections to the settlement. *See Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 811-12 (1985). The Parties' proposed class and settlement notices (the "Notices") meet each of the requirements enumerated in Rule 23(c)(2) as well as these additional due process requirements.

The proposed Notices and notice plan satisfy the requirements of Rule 23(e) and due process. The proposed Notices, submitted as Exhibit 5 and 6 to the ERISA Settlement Agreement, will be sent to the ERISA Class Members within sixty (60) days of the Court's entry of an Order for Preliminary Approval of the Settlements. The proposed Notices explain the nature of the action and the terms of the Settlement (including the Settlement Amount, the attorneys' fees to be paid, how settlement payments will be calculated, the claims that will be released) and explain how the

ERISA Class Member may collect his portion of the Settlement, exclude himself from the Settlement, or object to the Settlement. *See Lace v. Fortis Plastics, LLC*, 2015 WL 1383806, at *3 (N.D. Ind. Mar. 24, 2015); *Zolkos*, 2014 WL 7011819, at *6. In particular, the Notice will explain that a claim must be filed by the estates of class members to recover life insurance proceeds.

In addition to running a National Change of Address (NCOA) search upon receiving the class address list from Defendant, the Claims Administrator will skip trace any returned Class Notice Packages and will re-mail those for which an updated address has been found. This is the best notice practicable. *See Lace*, 2015 WL 1383806, at *4 ("class notice shall be mailed by first class mail by Settlement Administrator."); *Oaks v. Moss*, 2015 WL 5737595, at *2 (N.D. Ind. Sept. 29, 2015) ("The class administrator will confirm and if necessary update the addresses for class members through standard methodology that the class administrator currently uses to update addresses."); *Ohayon v. Hertz Corp.*, 2012 WL 4936058, at *5-6 (N.D. Cal. Oct. 16, 2012) (NCOA search and reasonable diligence to obtain addresses for returned mailings met the Rule 23 notice standards). The Notice Plan satisfies Rule 23(e) and should be approved.

D. The Proposed Service Awards Are Reasonable

Class Counsel requests service payments in the amount of $7,500 for Plaintiff Whisler who attended the mediation and $5,000 payable to each of the other twelve ERISA Plaintiffs. Each of the ERISA Plaintiffs have actively participated in this litigation. In particular, the ERISA Plaintiffs were deposed, answered discovery requests and sent numerous letters to each plan administrator as part of the process of exhausting administrative remedies. Further, Mr. Whisler attended and actively participated in the ERISA mediation session held in San Francisco. By engaging in these tasks, the ERISA Plaintiffs were of assistance to the ERISA class and their work should be financially recognized for such service. Service or incentive awards are typical in class-action cases. *Rodriguez v. W. Publ'g Corp.*, 563 F.3d 948, 958 (9th Cir. 2009). As the Seventh Circuit

has explained, "[b]ecause a named plaintiff is an essential ingredient of any class action, an incentive award is appropriate if it is necessary to induce an individual to participate in the suit." *Cook v. Niedert*, 142 F.3d 1004, 1016 (7th Cir. 1998); *see also In re Synthroid Mktg. Litig.*, 264 F.3d 712, 722 (7th Cir. 2001) ("Incentive awards are justified when necessary to induce individuals to become named representatives.").

Relevant factors in determining whether an incentive award is warranted include: 1) actions the plaintiff has taken to protect the interests of the class; 2) the degree to which the class benefited from those actions; and 3) the amount of time and effort the plaintiff expended in pursuing the litigation. *Cook*, 142 F.3d at 1016 (*citing Spicer v. Chicago Bd. Options Exch., Inc.*, 844 F. Supp. 1226, 1267 (N.D. Ill. 1993)).

Courts in the Seventh Circuit have repeatedly found an incentive fee of $15,000 or more to be reasonable. In *In re Southwest Airlines Voucher Litig.*, 2013 WL 4510197, at *11 (N.D. Ill. Aug. 26, 2013), *aff'd as modified*, 799 F.3d 701 (7th Cir. 2015), for example, the district court awarded $15,000 each to the two named plaintiffs, finding they had been active participants in the litigation, expending significant amounts of their time to benefit the class—including assisting with written discovery, preparing and sitting for depositions, and consulting with class counsel on a regular basis—and that their efforts benefitted the class. *Id*. at *11. Moreover, the court noted that awards of $15,000 for each plaintiff were "well within the ranges that are typically awarded in comparable cases." *Id*.

Here, Plaintiffs' counsel believes a service award of $5,000 each to the ERISA Plaintiffs is reasonable in light of the considerable contributions they made to this litigation, which included gathering documents, answering extensive interrogatories, preparing and sitting for depositions, exhausting administrative review of benefit claims under the applicable plans, communicating

with Counsel and Class Members, and staying up to date on the progress of the litigation, and not least of all serving as the public face of the Class with the risks inherent in acting as a named plaintiff against one's employer. Because Mr. Whisler prepared for and attended the mediation of the ERISA claim, it is respectfully requested that he be awarded $7,500. As a result, the ERISA Plaintiffs have performed a valuable service to the Classes they represent. Joint Declaration at ¶ 31. FXG does not object to the request for these awards.

Given the achievements for the absent class members and the consistency of this request with service payments awarded in other cases in this Circuit, the requested service payments are appropriate here.

E. The Court Should Set A Final Approval Hearing

The Agreement also addresses the third requirement for approval of a class action settlement: "the fairness hearing at which [class members] and all interested parties have an opportunity to be heard." *Armstrong*, 616 F.2d at 314; *Kaufman*, 2016 WL 806546, at *6 (courts may approve settlement that binds class members only "after proper notice and a public hearing."). The Agreement provides for a formal Fairness Hearing to be scheduled by the Court. (Agreement § VI(B)). At the Fairness Hearing, the Court will consider, among other things, whether to grant final approval of the terms of the Agreement, whether to grant Class Counsel's request for attorneys' fees and costs and for incentive awards to the ERISA Plaintiffs, as well as any objections to the settlement, Class Counsel's fee request, or the incentive awards. These provisions of the proposed settlement and Preliminary Approval Order satisfy "[t]he essence of procedural due process . . . that the parties be given notice and opportunity for a hearing." *Jones v. Nuclear Pharm., Inc.*, 741 F.2d 322, 325 (10th Cir. 1984); *Armstrong*, 616 F.2d at 314; *Redman v.*

RadioShack Corp., 768 F.3d 622, 637-38 (7th Cir. 2014) (requiring notice of requested attorney's fees so that informed objections may be made at fairness hearing.).

The Court therefore should set a hearing for final approval of the Settlement. Plaintiffs request that the Court set the date for the Final Approval Hearing no sooner than 180 days after the Court's grant of Preliminary Approval, or as soon thereafter as the Court's schedule permits. Plaintiffs propose that Plaintiffs' motion for final approval and supporting documents be filed fourteen days before the final approval hearing.

IV. CONCLUSION

For the foregoing reasons, the Parties respectfully request that the Court grant their motion and enter the proposed Order Granting Preliminary Approval to the ERISA Class Action Settlement asserted in *Craig v. FedEx Ground Package Sys., Inc*.

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Respectfully submitted,

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